

/224 cont./

These groups create general rules by establishing custom and by issuing spontaneous and ad hoc rules for cases not provided for, while the arbiters introduce (always as legislators) individualized, spontaneous and ad hoc rules.

Individuals do not participate in the legislative function.

The agents of Sarakatsani law are the same as its sources. However, they also include individuals, or rather specific individuals, according to their rank and status. Sources and individuals become agents the moment they apply established or spontaneous law by particularizing it in various concrete cases. However, aside from the arbiters and the individuals in question, other agents are not apparent because they are not specialized, their legal functions merging with their other functions.

The moment law is applied, the question of responsibility arises quite naturally. It falls equally on groups and individuals, depending on the case. The strong social integration of the Sarakatsani does not negate the responsibility of individuals. The latter see themselves called upon to assume it should the occasion arise.

As for sanction, this is generally part of the reaction which each society manifests with respect to certain behavior that does not conform to its principles. It therefore constitutes above all a social manifestation. Coercion presents the same character. It involves also another part of these same reactions.

Theoretically speaking, sanctions are divided into: first, those provided for, subdivided depending on whether they are organized and unorganized /sanctions/, applied by special agents or not; 225/ second, spontaneous /sanctions/ that is to say, relevant to a judgment "after the event" and set forth "from a feeling of what is good and fair." These can likewise be divided into organized or non-organized; 3rd, /sanctions/ directly imposed by physical force; 4th, /sanctions/ expressed in criticism or by attitudes conveyed in the behavior of the members of the corresponding society toward offenders.

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681 Among the Sarakatsani, sanctions and coercion, always social, can only exceptionally be organized (groups when they impose isolation, individuals according to the instances enumerated), since, ordinarily, there are no special agents or coercion. They /i.e. sanction and coercion/ are either provided for (customs) or spontaneous, and they are only exceptionally imposed directly by physical force, the case of sanction of crimes and misdemeanors constituting a peculiarity which we must consider separately.

671 But there is more. Though sanction is the result of an infraction and
681 strikes the one who has committed it, though coercion is a function that assures the application of sanction, though, finally, both sanction and coercion always go together in evolved societies, coercion never being thought of independently from sanction, among the Sarakatsani coercion may intervene and act without any sanction having been formulated beforehand. Its aim, in that case, is no longer the application of the sanction, but direct application of the rules of law. It is a little as though in our societies the police directly required citizens to conform to the rules of law without their first having passed through the channel of adjudication, of sentence and of sanction. As a result, and we must emphasize this very specifically, the sanctions listed are directed more toward prevention than toward repression.

Sarakatsani society prefers to protect itself in advance of any disorder by an appropriate and preventive maintenance of its law, rather than having to put right explosive and dangerous situations. However, when despite all, the latter flair up, Sarakatsani society does not hesitate to suppress them by resorting to sanctions of a penal order, physically inflicted. These sanctions are strictly applied, depending on the nature of the disturbance.

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/226/ We should now like to draw attention to the fact that sanction and coercion are most often disguised in Sarakatsani law.

This phenomenon, represents one of the chief characteristics of Sarakatsani society. Quite apart from its importance in the life of the society, we believe that it can in addition contribute considerably to the theoretical

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671 and anthropological approach to laws other than those with which our advanced
681 societies are familiar.

121 This phenomenon is not entirely unknown to theorists. But if some
671 of them have had an inkling of it, no one, to our knowledge, has treated
it in clear terms. (36)

36. We have mentioned some of these authors in connection with some definite point. We shall take up their theories in their broad aspects, our previous remarks being an integral part of what follows.

In order to introduce the discussion, it will be well to start with certain comments on the famous work of B. Malinowski: Crime and Custom in Savage Society /cited in English/ (37)

(128)

37. Our questions refer to a French translation included in: Moeurs et Coutumes des Mélanésiens, to which our quotations refer.

(1926). The publication of this work, in addition to the influence that it has subsequently had on the anthropological theory of law, has made it possible to state the problem correctly.

What Malinowski does is to protest against the interpretations dominated by the ideas of L. Morgan--those of "Bachofen, of Post, of Bernoft, of Kohler and others who were grouped around the periodical Zeitschrift für vergleichende Rechtswissenschaft" (p. 10), those which are found again "in the works of the French school of Durkheim, in most American and German works and in some English works" (p. 11). "Basic to all these ideas," he says, "was the postulate that in primitive societies the individual is totally dominated by the group, the horde, the clan or the tribe, that he obeys the commands of his community...with servile passivity, so to speak, bewitched" (p. 11).

He also protests against E. Sidney Hartland and Dr. Rivers, cited above, who speak of an "unconscious and intuitive regulation of social life..."

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121 If we address ourselves to these entities we run two risks: first,
671 to confuse legal life with moral life in the sense that to conform to the
entities enumerated means to obey certain social values sanctioned by
general approval. It does not escape us that this approval implies a
utilitarian aspect of which we shall speak in the next chapter. But this
approval is not sufficient to insure absolute obedience by the persons
concerned. Non-conformism represents "minor" dangers--the individual often
is content with a minimum of consideration /229/ on the part of society.

Moreover, from the methodological point of view it appears that if one
accepts this interpretation, one leaves the sociological field in favor of
a psychologism limiting itself to "motivations" (a reality which only very
partially explains our problem).

The second risk is based on the "motivations" in question. Ambition,
pride, vanity, attachment, friendship, devotion, etc., are driving powers
which can operate in two ways. They can uphold law, but they can also
turn against it. For these motives, vanity for example or pride, have the
power to launch conflicts and disagreements, sometimes very acute, between
individuals and groups, and other individuals or other groups motivated by
attachment, loyalty or friendship toward the interested parties may continue
them and in doing so aggravate them and render them disastrous. Malinowski
does not tell us why vanity and pride would be dominated by law and justice
and not personal by self-esteem or egoism, nor why the authority of law
would prevail over rebellious individualism. There is a point here which shows
very well that psychology explains nothing if it is not used within concrete
categories and framework.

121 This is why we believe that if we assume the mechanism of sanction and
671 disguised coercion, we thereafter understand how individuals and groups obey
681 law; we avoid confusion with morals and the introduction of extraneous
psychological criteria into the true life of law. As a result, we base the
latter on objective reality, the pressure that the "social milieu" exerts

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to force interested parties to obey; finally, we fill the gaps left by the acceptance of the principle of reciprocity, while reinforcing its effectiveness where it exists.

Remarks of a similar order may be made with respect to certain theories that follow the same line as the ideas of Malinowski. This is the case with P. Eamein, (39) who also quotes Hogbin, (40)

39. Le droit et ses sources, p. 6-7.

40. Le droit et l'ordre en Polynésie (in English).

with Lowie, (41) with Van Vollenhoven who, in the second volume of his work

41. Traité, p. 389.

Het adatrecht van Nederlandsch Indië, (42) /the custom law of the Dutch Indies/

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42. The Dutch being inaccessible to us, we refer here to

Josselin de Jong's discussion of this author, published in his study which we quote later on.

1918 /230/ (pp. 236 and 400) published after the appearance of Malinowski's book, modified the thesis proposed in his first volume, according to which law is made up of rules of behavior that are not codified and are accompanied by organized sanctions. His new thesis involves a double criterion, the mutual interaction of two customs: on the one hand, commendation and disapproval, and on the other-- intimately bound to the former--imperatives or prohibitions in the heart of the collective conscience and conduct. According to Josselin de Jong's interpretation, Van Vollenhoven did not give up the criterion of organized sanction but, under the influence of Malinowski, he enriched it.

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Thus the field of customary law is enlarged, but its boundaries remain uncertain. This observation by Josselin de Jong shows very well the weakness of this theory, which its author tries to overcome, without success. Furthermore, Van Vollenhoven does not tell us how and by what mechanism disapprovals and commendations are linked to the collectivity, so that no distinction can be made between opinion and morals on the one hand, and law on the other.

Thus J.- P. B. de Josselin de Jong: Customary Law /cited in English/, pp.

/230 cont./

121 3-7, aware of the confusion caused by the comparison of customary law with
671 the totality of customs, as well as by the absence of a definition of law
strict enough to separate custom in general from our observations, and
sufficiently broad to include the entire gamut of manifestations of the
principle of legality, proposes eliminating the term "customary law."
For, according to him, the difference between customary law and custom is
one of form and not content. Thus, the authority of law is based on the
conviction that its existence is necessary and is based on the threat of
sanctions.

121 If we understand this author's idea correctly, it seems to us that,
671 despite his effort to dispel the confusion, his positions only aggravate it.
681 The moment he finds that the source of the authority of law lies not in
114 sanction, a social reality and an objective and positive criterion, but in
the feeling that it is useful, hence a psychological reality, the distinction
between legal customs and other customs becomes impossible. Hence it is
equally impossible to formulate a definition applicable to all manifestations
of legality. For all the customary norms of behavior can be regarded as
necessary, so that we are reduced to identifying custom in general with
law, that is to say, /231/ to a repetition of the errors that we mean to
combat. If we follow this author who, conscious of this risk, proposes to
abolish the idea of customary law, we are left with no hope of an approach to
non-evolved laws. Furthermore, the distinction between customary law and
custom is not a distinction of form, but of nature. It seems to us that
Josselin de Jong proposes the opposite, enticed by the fact that very often
the same custom has two aspects, two potentials: one as a model of behavior,
the other as a legal norm. The latter becomes real when sanction comes to
its aid in seeking to enforce it. And at that moment, custom becomes purely
legal and obviously acquires all the attributes of a law. If it does not
appeal to sanction but if, at the moment it becomes reality, it imposes it-
self through other means, it presents the attributes of a model or behavior.
These two situations are profoundly different. The difference is the same

4. /1.e., J.-P.B. de Josselin de Jong--Analyst/

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121 one that may be established between the moral imperative to respect the
671 life of another and the rule of the penal code forbidding homicide. The
681 content of the two commandments is the same, but their nature is different.
114 This is exactly what Malinowski said when he stated that legality is more
an aspect of tribal life than an independent arrangement.

Finally, if Josselin de Jong had sought to discover the real sanction associated with non-evolved laws, he would have avoided these slippery trails and would have entered the path leading to the definition of customary law.

121 We should now like to consider another theory which, like that of
671 Van Vollenhoven, also addresses itself to public opinion. It is Hoebel's
208 theory in The Law of Primitive Man /cited in English/. According to it,
in case of a claim for damages or the restitution of stolen goods, or even
punishment of the perpetrator of an illicit act, if the person responsible
admits his responsibility and if public opinion expresses itself in favor
of the plaintiff, this public opinion then represents a tribunal and the
whole process takes on a legal character (p. 25). Hoebel adds: "Primitive
law is characterized by the fact that the plaintiff, in demanding his right,
seeks to satisfy both his own interest and the interest of society in general.
Furthermore, primitive law shows a certain regularity" (p. 26). /English
quotation not found on designated page/.

121 Hoebel here draws quite close to the problem but /232/ does not get to
114 the heart of it. He individualizes laws and obligations, is aware of the
671 role of the group in the resolution of states of conflict, but he does not
208 tell us by what process "public opinion" is enforced. Therein lies the
weakness of his theory. As we have shown elsewhere, sanction and disguised
coercion differentiate absolutely between public opinion and what we have
called the "sentence arising from a group." Public opinion expresses an
attitude of the group with regard to a dispute. When this opinion is
dominated by the idea of justice and when it is armed with means of sanction
and coercion, even if it is not apparent, it represents a true sentence.

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121 Furthermore, Hoebel's idea concerning the regularity of primitive law is
114 only partially true. One cannot expect regularity in only cases where one
67 has to judge according to a spontaneous law based on equity, good sense
and "ad hoc". If one accepts the position of Hoebel, one must exclude all
these instances of juridical life.

121 We shall conclude these critical remarks by examining another category
67 of theories which base non-evolved law on its relations either to the
totality of social regulations or to morality.

121 Radcliffe-Brown, in his book Structure and Function in Primitive Society
67 cited in English/, and in agreement with R. Pound, notes first that law is
68 part of social control, but is not identified with it. "The field of law,"
he states, "will therefore be regarded as coterminous with that of organized
legal sanctions. The obligations imposed on individuals in societies where
there are legal sanctions will be regarded as matters of custom and convention
but not of law; in this sense, some simple societies do not have law, although
all have customs which are supported by sanctions" (p. 212).

Thus we come back to the formalistic conception of law: law is every
rule accompanied by legal sanction and legal sanction is every sanction imposed
"by a constituted authority, political, military or ecclesiastic" (p. 208).

Let us try now to see where the assertions of this author may lead. We
take as an example "the negative organized sanctions" which, according to
him, represent social reactions, social acts directed against persons open
to social disapproval because of their behavior, and which /233/ are carried
out according to traditional and recognized procedures. These acts consist
of the exposure of the culprit in public, his total or partial exclusion from
social life and the privileges that derive from it, the loss of his civil or
religious rights or of his social rank. In addition to all this, one also
finds confiscation of goods, or the infliction of corporal punishment--
mutilation, flagellation; even capital punishment.

Now if one excludes law as the justification for these acts, for this
punishment, what remains? Our author proposes morality and religion and

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121 above all the mechanism of social control (p. 208). But morality and
691 religion can play this role only partially, as Radcliffe-Brown himself
681 recognized albeit indirectly because, on the one hand, morality is not
imposed by force without a change in their nature, and, on the other
hand, punishable acts are not all related to religion. Finally, social
[626] control is a very general function which involves several others and is
therefore incapable of explaining this specific phenomenon.

Likewise, Radcliffe-Brown proposes that when sanctions are taken by
individuals or groups against individuals and groups (vengeance, duel,
blood revenge, etc.), under the control and with the approval of society,
diffuse sanctions "of public opinion" /cited in English/ are involved.

[114] This conclusion does not take us unawares. Since our author denies the
legal character of the terrible sanctions enumerated above, applied
collectively and according to a procedure determined in advance, it is
natural that he should deny this character to these additional, more
individualized sanctions.

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[626] We have shown, moreover, that public opinion is not able to impose
sanctions exceeding disapproval.

121 The question therefore remains open. We believe that the perspective
691 offered by our own position makes it possible to avoid the confusion of
law with other social regulations and to avoid the paradoxical idea that
societies can live without law when they do not have a specific judicial
apparatus.

Marcel Mauss, for his part (chapter VII of his Manual), says: "In
societies that ethnography singles out all legal phenomena are moral
phenomena, without exception; which does not mean that all moral phenomena
are necessarily legal in the strict sense" (p. 110). It remains to be
seen how one can distinguish law from morality. /234/ "Legal phenomena,"
says Mauss, "are organized moral phenomena (p. 111)...We know the presence
of morality and religion only from the presence of infraction and the
idea of sanction. There is moral obligation...when there is diffuse sanction;

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121 there is legal obligation when there is a precise definition of obli-
671 gation and a precise definition of infliction and for punishment...
Obligation is simply more rigid and more legal in the case of law"
(p. 112). That is not all. Mauss proposes still another criterion.
"All laws are considered good by definition; then again, conformity to
laws is good; it is necessary to social life. Everything that is in
conformity is good, everything that is antagonistic to this conformism is
bad. One would therefore recognize the moral and legal phenomenon by the
presence of the idea of good and bad, previously defined and always
sanctioned" (p. 112).

121 Now for Mauss the distinguishing criteria of law are three in number:
671 precisely defined obligation; precisely defined infliction /of penalty/
681 and punishment, hence sanction; authority based on the good, including
the value of conformity to rules. These ideas are not unknown to us.
We have criticized them in the foregoing. Let us recall that up to a
certain point we share them. However, we see ourselves obliged to remark
that if one contrasts diffuse sanction appropriate to moral phenomena
with definite sanction, fixed and organized, as appropriate to law,
one leaves out manifestly legal phenomena such as obedience to arbiters
which appears not to be enforced by sanctions and, what is worse, one
risks linking these phenomena to morality. This is the case for example,
for G. Gurvitch, when he gives priority to morality over law in patriarchal
societies. But we shall speak of this in the next chapter.

We should like to conclude this theoretical test by pointing out that if
we introduce into the arsenal of the theory of law the idea of disguised
sanction and coercion we shall be equipped with a new, very effective
criterion which permits us to follow paths that have hitherto been inacces-
sible.

It does not escape us that our argument is based only on one example
and that consequently, before being more fully accepted, it must be tested
in other social contexts.

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121 /235/ Nevertheless, testing it against the experience of the authors
671 enumerated seems to reinforce the hope that disguised sanction and coercion
681 also exist elsewhere, and that in any case it represents a good working
hypothesis.

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121 Be that as it may, the solution of disguised sanction and coercion
671 fits well into the Sarakatsani way of life. It would be difficult to
681 imagine any other way. Faced with the dilemma of either not having
182 organized justice (in view of the difficulties of living in small groups
and nomadically), or of having one that is ineffective for lack of organ-
ization to maintain it, Sarakatsani society has chosen the solution
described which meets the demands of the problem. It assures and guarantees
the functioning of the social organization and it enforces order without
burdening the organization of the group. Therefore the fit between this
solution and the social framework seems perfect.

FINAL EVALUATION

671 Customary law, spontaneous law, structureless and disguised law,
these are the aspects under which Sarakatsani law presents itself.

671 Issuing from collective sources, this law is also imposed by group
681 agents which are the same as these sources, even in cases where adjudication
and its execution are confined to individuals--representatives of the group
which recognizes their prerogatives, functions and efficacy.

Though intimately bound up with other social regulations, it retains
its autonomy. And though exposed to the influence of magico-religious
beliefs, above all when it is spontaneous, it clearly keeps its rational
character.

Without abolishing the rights and responsibilities of individuals, it
favors groups and cooperation, and disfavors individualism. Individual
rights exist only when they are compatible with the "group" and in sympathy
with the latter (43) --the "invisible government" according to the expression

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671 of P. Radin. (44)

44. P. Radin: Le monde de l'homme primitif, p. 221 f.

671 /236/ Its sanctions guarantee its functions, at once distributive,
681 preventive, restitutive, repressive. They are not taken from the law
182 of retaliation, as the instance of the vendetta particularly demonstrates.
(627) They are based on the idea of the defense of the social equilibrium or
its reestablishment if it is temporarily disrupted.

Thanks to the mechanism of disguised coercion, it acquires, citing the expression of Mauss, (45)

45. Manuel, p. 110.

a character of strongly felt intimacy and community, for it can become involved at any moment in the smallest details of the life of our herders.

671 Seemingly simple, if not simplistic, but basically very complex,
182 Sarakatsani law meets the need for social control with extreme efficacy, which one would not dispute if one looked closely at its social context. For the dynamics of Sarakatsani law, transmitted in the social framework to a large extent give it its stability.

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CHAPTER IV

MORAL PHENOMENA AND MORALITY AMONG THE SARAKATSANI

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Morality among the Sarakatsani is neither systematized nor doctrinal. It is bound up with many aspects of their lives, in symbols, attitudes, conduct, habits, customs, language, cultural works, all of which serve as its vehicles. (1)

1. This phenomenon is not peculiar to the Sarakatsani alone. See A. Bayet: La science des faits moeurs, p. 17.

In attempting to recognize it and make it clear, the problem of an operational criterion of procedure arises. "In order to observe the moral phenomenon, one must also know what characterizes it, by what distinctive mark it can be recognized," Durkheim (2)

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577 The Sarakatsani may therefore take his choice between non-distinction,
dishonor and honor. These are the limits within which he may deploy his
moral activity.

577 These alternatives have their justification in the risks that one
156 runs socially by the choice one makes. By choosing non-distinction the
subject injures only himself. By opting for infamy (though this may seem
paradoxical), that is to say, by violating fundamental rules or denying
the "minimum morality," the individual or the group endanger the collectivity
which then would react against them with severity. By preferring honor one
becomes a pillar of social life, for, thanks to the conduct and example one
offers to all, one contributes to its solidity. Honor is the reward to
those who have embodied Sarakatsani morality. They become "morality in
person."

577 /243/ As for the line of demarcation separating morality from law, the
671 foregoing remarks show that the major requirements constitute the common
681 threshold. It is in terms of the importance of the infraction committed,
therefore the importance of the risks run by non-conformity, that the
foregoing passage, analyzed from the standpoint of legal reactions will be
understood, and that the mechanism of sanction and coercion is activated.

(626) Thus, the major moral requirements and law may intermingle, the difference
residing in the concrete fact of the intensity of social repression: either
society is content simply to scorn the culprit or it decides to react more
violently.

577 It follows that morality, as social control, occupies a prominent place
626 among the Sarakatsani, though it cannot be placed above the law. Despite
671 its rigidity, especially with reference to major requirements, it comes after
law, though it complements and aids the latter by its own prestige.

577 The regulation of the actions of these herders, tough, intrepid, indepen-
181 dent human beings, true fighters ceaselessly striving to conquer innumerable
671 difficulties and obstacles, requires means more powerful than morals, hence

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in family or society symbolic ornaments bringing about fecundity among women).

182 Nevertheless, every economico-social system has need of another
691 system of rules which will socially guarantee the first. The Sarakatsani
thus introduce their law first of all, based on custom, equity and
common sense, which means that this law, along with crystallized rules,
includes spontaneous and ad hoc prescriptions. It sanctions the fundamen-
tal organizing rules of their life and the functioning of their social
and economic institutions which it makes their own. Its salient character-
istic is to favor cooperation and its results, and to combat individualism;
182 Its chief concern is to protect kinship and herding by its penal provisions;
691 that is why it does not hesitate to threaten miscreants with capital
681 punishment (the vendetta, for example). In any case, and in order to
impose itself, it introduces a mechanism of adjudication, of sanction and
coercion, sometimes not apparent, which are in keeping with isolation (not
to resort to the justice of "the foreigner") and to the necessity of showing
itself effective, though there does not exist among them a specific legal
[626] apparatus. The principle of conformity finds its best means of expression
here, while enforcing the mechanism in question. On the other hand,
182 morality, by its mechanism of honor or dishonor maintains all the rules
591 enumerated, integrating them into its principal values such as tradition,
181 family, chastity, community, bravery and independence, which basically
represent merely the main ideas of Sarakatsani life elevated to the level
of morality.

There is nothing astonishing in this state of affairs. The moment a society accepts and proposes a certain number of fundamental principles on which it bases its life, it is altogether normal that these principles be raised to moral values. The contrary would result in meaninglessness.